No. 4677

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JEU JO WAN, On Habeas Corpus,
Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco,
Appellee.

REPLY BRIEF FOR APPELLEE.

FILED
DEC 1 1925
F. D. MONCKTON,
CLERK

GEO. J. HATFIELD,
United States Attorney,

T. J. SHERIDAN,
Assistant United States Attorney,
Attorneys for Appellee.

Parker Printing Company, 523 Clay Street, San Francisco

No. 4677

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JEU JO WAN, On Habeas Corpus,
Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco,
Appellee.

REPLY BRIEF FOR APPELLEE.

STATEMENT.

This is an appeal from the order of the District Court of the Northern District of California sustaining a demurrer to and denying a petition for a writ of habeas corpus. The petition had been filed to test the validity of an order of the Immigration Department excluding petitioner, an alien Chinese person, from the United States when he applied for entry.

The record of the Department of Labor in regard to the case of petitioner has been sent to this court

and constitutes a part of the record. It appears therefrom that under date of February 19, 1924, two person residing at San Diego, California, describing themselves as American citizens of Chinese birth, made an affidavit stating that they were "desirous of of establishing and maintaining a native school for their own and other Chinese children in said country to supplement their American education". They further stated that they wished to procure the services of Jeu Jo Wan (petitioner) a teacher at Macoo, Canton, China, to take charge of such school in San Diego, and that the affidavit was to facilitate that purpose. It further appears from documents in the folder that on August 25, 1924, the petitioner verified an application for an immigration visa (non-quota) at Hong Kong, using consular form number 256. In this form he stated that his calling, or occupation "is teacher" and "that my purpose in going to the United States is teaching and I intend to remain indefinite". He thereupon negatives his being a member of various classes of individuals excluded from admission but admitted two: "(25) natives of Asiatic barred zone"; "(27) aliens inadmissible to citizenship" and thereupon stated "that he claimed to be exempt from exclusion on account of class number 25 and 27 noted above, for the reasons following, to wit, professor in Chinese school under Section 4 (d) that he claimed to be a non-quota immigrant as defined by Section 4 of the Immigration Act of 1924, and the facts on which such claim is

based are as follows, to wit: on account of being professor in Chinese school under Section 4 (d)". Thereupon the vice-consul appended a visa as a non-quota immigrant under the subdivision of the section referred to. He also sent to the Commissioner of Immigration at San Francisco a precis in re Jeu Jo Wan, stating in brief pertinent facts. There was also given to petitioner a so-called "form of Chinese certificate", a Section 6 Certificate, indicating in the case of petitioner that his former occupation and present occupation is "teacher", and giving the time and place pursued, the certificate having been issued at Hong Kong, May 2, 1924, and later certified to by the Consul General of the United States.

Petitioner arrived at San Francisco on the 19th of September, 1924, and was by an immigration officer held for examination before a board of special inquiry.

On September 24, 1924, the petitioner was examined before the Board of Special Inquiry, and,among other things stated "that he was coming to this country to be a teacher in San Diego; that he expected to remain in the country "as long as they engage me as a teacher", and that there was no agreement about the time of engagement; that he intends to return to China when the engagement is ended (Ex. A, p. 5). Witness was asked:

> "Q. Just what does your education qualify you to teach?

> A. A teacher for the higher primary school.
> Q. Are you able to qualify as a professor of a college, academy, seminary or university?
> A. No." (Ex. A, p. 6.)

Witness stated that he would not come to the country at this time if it were not for the agreement to teach school in San Diego and:

> "Q. Does the board correctly understand you to state that you are qualified to teach only up to the higher primary?
> A. Yes." (Ex. A, p. 5.)

On October 1, 1924, the statement of certain witnesses was taken before an inspector in charge at San Diego, being one Hu Him Ting, being one of the persons referred to in the affidavit as desiring to establish a Chinese school.

Referring to the school, it is said:

> "Everything is prepared." "We have rented the school building on I Street, number 304, if I remember right, here in San Diego. We have that all rented and when he comes we will fix it up." "And that the rent was $25 per month."

And referring to the employment of Jeu Jo Wan:

> "We have agreed to pay him $100 per month. We have not agreed to retain him any certain length of time but if he is alright we will keep him for a teacher right along." (Ex. A, pp. 15, 14.)

At the same time witness Jow Pon Don testified that he was one of the persons signing the document referred to and said that it was agreed to pay peti-

tioner $100 a month, the expense to be divided among the pupils (Ex. A, p. 12). The witness' statement that he was an American citizen was admitted to be erroneous, but the circumstance is, perhaps, immaterial.

On the 14th day of October, 1924, at a further hearing before the Board of Special Inquiry petitioner gave testimony as to his situation and status. At such examination the applicant testified through an interpreter and was asked the following question:

> "Q. In order that there may be no confusion in your mind as to the requirements laid down by the present Immigration Act, approved May 26, 1924, I will request the interpreter to read you Section 4 (d) same Act (interpreter complies).
>
> Q. Do you think you come under the requirements of the extract of law just read you?
>
> A. No, I don't think I do."

Of course, the construction of the law is in your hands (Ex. A, p. 19).

Upon such testimony the Board of Special Inquiry recommended the exclusion of petitioner, and, an appeal having been taken, the record was sent to the Commissioner General of Immigration. Upon a hearing in that bureau before a Board of Review, the following decision was made:

> "55392/636 November 12, 1924.
>
> San Francisco
>
> In re: Jeu Jo Wan, aged 30.
>
> This case comes before the Board of Review on appeal.

Attorney Hendry granted a hearing. Attorney McGowan at the port.

This is the case of a Chinese applicant who arrived at the port of San Francisco on September 19, 1924, and sought admission as a Section 6 teacher. He was excluded because the port authorities do not believe that he is qualified for admission under Subdivison (d) of Section 4 of the Act of 1924.

The applicant has presented a teacher's Section 6 certificate with a non-quota immigration visa issued under Section 4 of the Act of 1924. Subdivision (d) of Section 4 provides for the admission of 'An immigrant who continuously for at least two years immediately preceding the time of his application for admission to the United States has been, and who seeks to enter the United States solely for the purpose of carrying on the vocation of * * * professor of a college, academy, seminary, or university * * ''

The record would appear to indicate that this man is seeking admission upon the instigation of two residents of this country, viz., one Jow Pon Din and one Hee Hen Teng. These two men have been examined, and state that it is their desire to have a teacher from China instruct their own, as well as a few other children in the neighborhood, in the Chinese language and ways. The applicant states that he is a graduate of a normal school, and claims to have taught the elementary classes in his home village as well as the middle class school in Canton.

The section of the law under which he is attempting to enter was read to him in the Chinese language and explained, and, when asked if he thought he could qualify, he replied in the negative. He was also asked if he could qualify to accept the professorship in any college, and replied that he could not. It is clear that, while

this man is a teacher of the elementary grades, he is not a professor as contemplated by Congress in Subdivision (d) of Section 4, in which it referred strictly to professors.

The attorney has attempted to show that the use of the word 'vocation' in said subdivision means any kind of teacher, but it is believed that his interpretation of this word is erroneous.

After careful consideration of the entire record, the Board of Review is of the opinion that this man is not admissible under Subdivision (d) of Section 4; and, as he is otherwise without an admissible status, it becomes necessary to recommend exclusion.

It is recommended that the appeal be dismissed.

W. N. Smelser,
Chairman, Secy. & Comr.
Genl's Board of Review.

ES:hms

So ordered:

Robe Carl White,

Second Assistant Secretary."

ARGUMENT.

I.

APPELLANT WAS INELIGIBLE TO CITIZENSHIP; WAS INADMISSIBLE AS A NON-QUOTA IMMIGRANT AND NOT WITHIN ANY EXCEPTION TO THE TERM "IMMIGRANT" AS DEFINED IN THE IMMIGRATION ACT OF 1924.

It is conceded that the applicant was an alien Chinese person and thus ineligible to citizenship. It was so stated in his application to the consul for a visa.

Under the provisions of Subdivision (c) of Section 13 of the Immigration Act of 1920, it is provided:

> "(c) No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of subdivision (b), (d), or (e) of Section 4, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, or (3) is not an immigrant as defined in Section 3."

In his application the petitioner did not claim to come under any admissible subdivision of Section 4 of the Act, except under Subdivision (d) of Section 4, as follows (pertinent matter, our italics):

"(d) An immigrant who continuously for at least two years immediately preceding the time of his application for admission to the United States has been, and who seeks to enter the United States *solely* for the *purpose* of, *carrying on the vocation* of minister of any religious denomination, *or professor of a college, academy, seminary, or university;* and his wife, and his unmarried children under 18 years of age, if accompanying or following to join him."

Petitioner claimed to be a professor of a college, academy, seminary or university. Reaching the United States, however, when the case came before a Board of Special Inquiry, on September 24, 1924, page 7, he was asked, "Q. What does your education qualify you to teach? A. A teacher for the higher primary school. Q. Are you able to qualify as a professor of a college, academy, seminary or university? A. No." (Ex. A, p. 6.)

Later, on October 14, 1924, in a further hearing, Subdivision (d) of Section 4 referred to was read to applicant by the interpreter, whereupon he was asked, "Do you think you come under the requirements of the extract of the law just read to you? A. No, I don't think so. Of course the construction of the law is in your hands." (Ex. A, p. 19.)

It thus appears that it could not be deemed that the board acted unfairly in accepting as a fact the precise thing declared by petitioner on oath.

Later an appeal was taken to the Secretary of Labor and the matter was presented by counsel at Washington in a brief appearing in the files. There was no question as to the Department's view of the facts. Counsel urged that under the phraseology of Subdivision (d) referred to one would be deemed qualified, if he was any kind of a teacher; that is to say, that the words "occupation of the professor" were not restricted to being a professor of the schools referred to, but that it meant any kind of a teacher. It is not surprising that this view did not meet with the Department. Had Congress so intended it would have been quite simple to use the word "teacher".

The order of exclusion having been affirmed by the secretary, the petitioner has shifted his ground and has applied for a writ of habeas corpus upon the theory not that he is included within Subdivision (d) of Section 4, but that his case would come within the provisions of Subdivision (6) of Section 3. The pertinent portions of that section are as follows:

> "Sec. 3. When used in this act the term 'immigrant' means any alien departing from

> any place outside the United States destined for the United States, except * * * (6) an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation."

Thus petitioner is driven by the exigencies of the case to now contend that he shows that he comes in solely to carry on trade, and this under and in pursuance of an existing treaty of commerce and navigation.

But the case of appellant seeking to come to this country to be employed as a teacher of a primary school is not the case of one coming "solely to carry on trade". This is seen,

(a) From a consideration of the meaning of the phrase "solely to carry on trade" as defined by lexicographers; and

(b) From a consideration of the rule of statutory construction which would assign a meaning to each portion of the statute for it appears that the Congress by another provision regulated the entry of such members of the teaching profession as it desired to admit.

The phrase referred to would not include a teacher.

Thus in the Standard Dictionary the primary meaning assigned to the word "trader" is,

> "1. One who trades, particularly one whose business is to buy and sell goods. 2. A vessel employed in any particular (foreign or coastwise) trade; as, an East-Indian *trader.*"

And the word "trade" as a verb is defined as,

> "1. To dispose of by bargain and sale; now, especially, to barter; exchange, as to *trade* horses."

And the word "trade" as a noun is defined as,

> "1. A business learned or carried on for procuring subsistence or profit; particularly, a skilled or specialized handicraft; the occupation of an artisan.
>
> Formerly trades were entered only through apprenticeship. The word *trade* is properly applied to pursuits which are distinguished from unskilled labor, agricultural employments, commerce, the learned professions, and the fine arts. 2. Buying and selling for gain or as a means of livelihood; mercantile traffic; commerce; hence, any individual bargain; as, to engage in foreign *trade.*"

In the New International Dictionary, the word "trader' is defined as,

> "The act or business of exchanging commodities by barter, as by buying and selling for money; commerce."

The word "trade" is defined as,

> "One engaged in trade or commerce; one who makes a business of buying and selling or bartering; a merchant as a trader to the East Indies."

Persons who are said to carry on "trade" are considered to be engaged in merchandising, and the ordinary skilled handicraft, as distinguished from *agriculture, learned professions and liberal arts* which are not so included.

The law lexicographers give substantially the same meaning. Thus Bouvier's Law Dictionary primarily defines "trade" as

> "Any sort of dealings by way of sale or exchange; commerce, traffic";

also

> "The dealings in a particular business; as, the Indian trade; the business of a particular mechanic; hence boys are said to be put apprentices to learn a trade",

and the same author defines a "trader" as

> "One who makes it his business to buy merchandise or goods and chattels and to sell the same for the purpose of making a profit."

Such meanings are commonly assigned to the word in construing the bankruptcy act.

And among the definitions given in the Encyclopedic Dictionary, is the following:

> "The business which a person has learned, and which he carries on for subsistence or profit, occupation; particular employment, whether

> manual or mercantile as distinguished from the *liberal arts* or the *learned professions* and *agriculture.*"

Appellant has taken some pains to show that the teaching profession is a learned profession. But, as we have seen from the definitions of lexicographers, such calling would be precisely that not included in the term "trade" or "trader". For, as we have seen, the words "trade" or "trader" are primarily of a mercantile meaning and, especially, they do not include *agriculture, liberal arts,* or the *learned professions.* The Japanese Treaty authorizes the entry of Japanese nationals into the United States to "carry on trade" and authorizes them to establish houses for "residential and commercial purposes". But that the legislature of this state can prevent them from holding lands for *agriculture* has been well established.

The brief of appellant contains liberal quotations from the Congressional Record of proceedings in the Senate on the occasion of the adoption of the so-called restrictive "Ineligible to Citizenship" ban. Proceedings in a legislative body have a place in the construction of statutes, but this is only where the statute is ambiguous and needs construction. In the instant case such is not the fact for a statute that restricts entry to persons "coming solely for trade" and which *ex industria* specifies that the members of the teaching profession who can come are those coming solely for the purpose of carrying

on the vocation of professor of a *college, academy, seminary* or *university,* is not ambiguous in that respect. It could not be contended that the Congress, having made this provision respecting teachers, meant to include other teachers not specified under the term "coming solely for trade". Moreover it is quite apparent that the discussion in the Senate was concerning the Japanese Treaty of 1911 which does not refer to teachers but does employ the term "To carry on trade" (37 Stat. 1504).

The references of Senator Shortridge were to the Japanese treaty of 1911, (brief Record, Vol. 65, page 5744) (Appellant's brief, p. 9).

It is no doubt true that the amendment under discussion is not to be deemed to refer to the Japanese Treaty alone. But as far as the discussion on the floor of the Senate is to be looked to as an aid to statutory construction, it would necessarily be limited to the precise thing under discussion by the Senators, which was expressly the Japanese Treaty.

Indeed we gather from the excerpts quoted an argument to the contrary of what counsel contends in regard to the construction of the statute. For it appears that originally the Secretary of State proposed the amendment allowing the entry as follows:

> "An alien entitled to enter the United States under the provisions of a treaty."

Subsequently the Secretary was led to suggest a modification so as to read:

> "An alien entitled to enter the United States under the provisions of an *existing* treaty."

But the Senate in perfecting the act saw fit to still further modify the phrase by making it read as:

> "An alien entitled to enter the United States *solely to carry on trade,* under and in pursuance of the provisions of a present existing treaty of commerce and navigation",

thus expressly limiting the previous provision which might be said to recognize all the provisions of any treaty.

Had the relevant portion of the act stood alone in the employment of the phrase "coming solely to carry on trade" under and in pursuance of the provisions of the present existing treaty of commerce and navigation, it would not in view of its well recognized meaning be held to include members of the teaching profession. But this contention is reinforced and put beyond controversy when it is seen that Congress went further and made an express provision to cover the case of the teaching profession, and in order to prevent abuse saw fit to limit it to the class that would most likely be seeking to come in good faith to carry on such profession.

It is coming to be a well known custom for colleges and universities to receive what are called "exchange professors"; that is to say, a professor of celebrity will go from one country to fill a chair temporarily in a foreign university; a foreign professor comes to the United States for such purpose,

Doubtless the provision of the act was designed to facilitate that sort of thing which may be of great utility. But we have no such provision in the case of the ordinary primary school teachers. Indeed, to allow such to come *ad libitum,* being persons, perhaps, merely able to read and write, and thus claiming to be able to teach primary grades, would result practically in an influx of laborers.

Even, in line with existing treaties the Congress could enact legislation to prevent an abuse of the right to come into the United States under a treaty and thus define and limit terms. Indeed, under the cases, the so-called lottery vendor or peddler is not to be taken as a merchant and thus entitled to enter. Similarly, the Congress could without any breach of faith enact legislation limiting the persons entitled to come as teachers to those able to act as teachers in the full sense by accepting chairs in colleges and universities.

In any event, as we have seen, Congress did that very thing in precise, pertinent, clear language not needing construction.

The record will not bear counsel out in his contention that applicant comes into the United States to found or establish a school or college. He comes merely as a month to month employee of persons seeking to establish such school. Moreover a proper construction of the Immigration Acts, even in the light of existing treaties, would require the provision referred to to be construed as authorizing only per-

sons who are otherwise entitled to enter the United States to establish and maintain such schools and colleges.

It will further be noted that the clause of the Chinese treaty principally relied on ends with a so-called "favorite nation" clause. Such clause may extend rights in certain cases, but in other cases may limit them. It would not be contended in any quarter that the provisions of Subdivision (6) of Section 3 of the Immigration Act of 1924 would authorize the nationals of any and all countries to come in *ad libitum* under the claim of intending to carry on trade to the extent the applicant now contends. Indeed, the construction contended for would give to Chinese nationals a favorite status in seeking to come into the United States that would not be assigned to any other nationals.

CONCLUSION.

In conclusion it is submitted that we have the case of an alien immigrant of Chinese nativity ineligible to citizenship who came to the United States seeking entry as one who came to carry on the calling of a professor of a university or college. He made no other claim. Although he had so-called Section 6 Certificate, he also had the set of forms constituting a consular visa under the present Immigration Act. The latter would limit the former. Upon his examination he was found to be wholly

inadmissible under the status which he avowed. On an appeal to the Department his counsel undertook to show that the words of the provision embraced all teachers. Failing in that he has shifted his ground in court to make the claim that he was not an immigrant at all in that he comes solely to carry on trade. The statute will not bear a construction broad enough to include his situation. Nor is there any question of treaty really involved. The Congress could have regulated the entrance of persons claiming to come under the treaty so as to avoid abuse. Moreover Chinese persons have no treaty rights superior to those of other nations. As long as there was an endeavor to exclude Chinese persons alone, the courts might have been liberal in allowing entry under the favorite nation clause appearing in the treaty with China. But since the contention of appellant would now amount to a claim that Chinese persons are to be given greater rights than those of any other nationality, such a construction would not be so desirable.

In the two cases recently decided by the Supreme Court of the United States

Cheung Sum Shee v. Nagle;
Chang Chan v. Nagle,

do not contain anything in opposition to the view here contended for. It was conceived that the wives and families of merchants were admissible not under any right of their own but subordinate and appurtenant to the mercantile status of the husband

and father. Prior to the enactment of the Immigration Act of 1924, it had been construed that wives of merchants could enter with them, although not otherwise specified. The decisions admitting them as subordinate or appurtenant to the status of a merchant were known by Congress and no particular provision was made in respect thereto. There would be reason for giving the same construction.

Here the appellant does not seek to enter as subordinate to any other having the right of entry. He seeks to enter in his own right under a phrase which manifestly cannot include him.

Among the cases cited by appellant is the California case of

State v. Tagami, 69 Cal. Dec. 245.

By that case it was considered that under the treaty of 1911 between the United States and Japan one seeking to establish a "health resort and sanitorium" had the right to do so under the treaty. But in the first place the opinion proceeds largely upon the consideration of the bearing of the words "commerce" and "commercial" as used in the treaty under review, it being held that these terms were given a rather enlarged significance. But the discussion of Justice Richards in regard to the meaning of the terms "trade" and "commerce" does contain a significant concession, to wit,

> "Each of these terms has sometimes been subjected to two limitations which would dis-

> tinguish them from unskilled labor and even from agricultural employments on the one hand and *from professional employments* and from the exercise of the *fine arts on the other.*"

Referring to another case cited by appellant

Asakura v. Seattle, 265 U. S. 332,

it may be said that the business of pawnbroking, as defined in the Seattle Ordinance, manifestly would be that of one carrying on a commercial business and thus fall within any ordinary definition of "trade". We note, however, the significant concession at the end of the opinion, to wit,

> "The question in the present case relates solely to Japanese subjects who have been admitted to this country. We do not pass upon the right of admission or the construction of the treaty in this respect as that question is not before us and would require consideration of other matters with which it is not now necessary to deal."

The court was apparently at pains to discuss the character of the business of pawnbroking in order to show that it would fall within the designation "trade". In the instant case a construction is contended for broad enough to render unnecessary any analysis of a precise business which might be under consideration. Counsel would cover by the phrase "to carry on trade" practically every kind of a business or calling.

Nor do we find anything in the case of

Tatsukichi v. U. S., 260 Fed. 104,

in aid of counsel's contention. That case really de-

cides that a teacher is a member of a learned profession, a doctrine as to which we make no dispute. The case did not in any manner turn upon the provisions of the treaty. When the case arose there would have been no law excluding the Japanese applicant, except the contract labor act, and it was reasoned that such act did not exclude him. In the absence of restrictive legislation, of course, foreign nationals may enter the United States, whether the right be guaranteed by treaty or not. It is only in the case of legislation as it now exists, where none may enter except for example, "solely to carry on trade" as agreed to by treaty, that the question of the construction of the treaty would arise.

Indeed, it must be clear that considering the express language of the Immigration Act of 1924, and giving the language of Subdivision (6) of Section 3, and Subdivision (d) of Section 4, any reasonable construction, the case of petitioner cannot be brought within its terms.

Nor can it be said that such excluding construction of these provisions would conflict with the Chinese Treaty cited, or in any way amount to a breach of faith. Congress without such breach of faith would have the right, and it has availed itself of such right, to define terms or concepts made use of in the treaty to avoid abuse or to prevent fraudulent entry. The Congress did that very thing in enacting Section 2 of the so-called "McCreary

Act", the Act of November 3, 1893, (28 Stat. 7). In that Act the Congress adopted a definition of the word "merchant" which has been frequently applied by the courts.

In the case of

Lee Kan v. U. S., 62 Fed. 914,

one of the cases cited by petitioner, a reference is made to a certain statement of Mr. Geary on the floor of the House of Representatives, wherein it was stated that there was asked a definition of the word "merchant" "which be broad enough to protect every man legitimately engaged in that industry, and narrow enough to prevent the designation being used as an instrument of fraud by a class we do not desire". So in the instant case it is contended that a definition prescribing the qualifications of "teachers" who seek entrance so as to admit only regular teachers,—teachers fully qualified to carry on their profession to the fullest extent, the Congress was not only within its competency and power but would have committed no breach of faith. Indeed, it may be asserted with confidence that the design in the original treaty was to admit fully competent "teachers" and to bar others who might be shown to be able to read and write, for example, or to teach some kindergarten or primary school, but who would in effect be in no respect different from the great number of Chinese laborers.

In conclusion it is submitted that the legislation under review here is plain; the language does not need, nor admit of construction, and that assigning the only reasonable construction possible there would be essentially no breach of faith on the part of the United States. Such legislation would not be without precedent of long standing.

It is respectfully submitted that the order of the District Court should be be affirmed.

Respectfully submitted,

Geo. J. Hatfield,
United States Attorney,

T. J. Sheridan,
Assistant United States Attorney,

Attorneys for Appellee.